U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

FILE: [redacted] Office: PHILADELPHIA, PA Date: APR 10 2003

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h)

ON BEHALF OF APPLICANT [redacted]

PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

[redacted]

DISCUSSION: The waiver application was denied by the District Director, Philadelphia, PA, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Jamaica who was admitted to the United States on June 16, 1994, as a nonimmigrant visitor with authorization to remain temporarily. The applicant failed to depart at the end of his temporary stay. He was found to be inadmissible to the United States under section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having been convicted of a crime involving a controlled substance. The applicant is married to a United States citizen and he is the beneficiary of an approved Petition for Alien Relative. The applicant seeks a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with his spouse.

The district director concluded that the applicant was statutorily ineligible for a waiver of inadmissibility and denied his application accordingly.

The record reflects that on July 6, 1995, the applicant pled guilty to criminal possession of marihuana in the third degree, in violation of New York Penal Law, section 221.20. As a result of his guilty plea, the applicant was sentenced to five years probation.

Section 221.20 of the New York Penal Law states, in pertinent part, that:

> A person is guilty of criminal possession of marihuana in the third degree when he knowingly and unlawfully possesses one or more preparations, compounds, mixtures or substances containing marihuana and the preparations, compounds, mixtures or substances are of the aggregate weight of more than eight ounces.

The district director concluded that in order to qualify for a waiver pursuant to section 212(h) of the Act, the applicant must have been convicted of only a single offense of simple possession of 30 grams or less of marihuana. The applicant thus did not qualify for the waiver. *See District Director Decision,* dated April 24, 2002.

On appeal, counsel asserts that:

> A Waiver of Inadmissibility under INA 212(h) is available to first-time applicants for permanent residence in conjunction with an Adjustment of Status application. This waiver is applicable even for prior convictions involving aggravated felonies, including drug offenses.

[redacted]

See Appellate Brief, dated July 17, 2001 at 2.[1] Counsel additionally asserts that the applicant's United States (U.S.) citizen wife will suffer extreme hardship if the applicant has to return to his native country of Jamaica. The record additionally contains copies of July 2001, news articles about social and political unrest in Jamaica during that time. Counsel additionally submitted extreme hardship letters from the applicant's wife, as well as his employers and friends.

Counsel claims that the Board of Immigration Appeals (BIA) case, *Matter of Michel*, 21 I&N Dec. 1101 (BIA 1998) supports his contention that the applicant is eligible for a section 212(h) waiver. In *Michel*, the BIA stated:

> We recognize that although a conviction for an aggravated felony is not a ground of inadmissibility, the respondent is inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Act because his conviction constitutes a crime involving moral turpitude. However, an alien who is inadmissible under this section may, if statutorily eligible, seek a waiver of inadmissibility under section 212(h) of the Act (citation omitted.)
>
> Section 212(h) of the Act . . . as amended by Illegal Immigration Reform and Immigrant Responsibility Act of 1996 . . . ("IIRIRA"), limits statutory eligibility to apply for a waiver in certain cases . . . .

Michel at 1103.

Section 212(a)(2)(A)(i) of the Act states:

> (2) Criminal and related grounds. —
>
> (A) Conviction of certain crimes. -
>
> (i) In general. - Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of -
> (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime,

[1] Notations in the record indicate that the applicant's 30-day time period to appeal was extended by the district director. This appeal is thus considered timely.

> or
> (II) a violation of (or conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.

Section 212(h) of the Act provides, in pertinent part, that:

> The Attorney General may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), (D), and (E) or subsection (a)(2) *and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana* . . . . (emphasis added.)

Michel, supra, did not involve an alien charged with inadmissibility for controlled substance violations under section 212(a)(2)(A)(i)(II) of the Act. Rather, the respondent in *Michel* was an alien who was charged with inadmissibility as a convicted aggravated felon who had committed a crime involving moral turpitude (burglary and grand theft) pursuant to section 212(a)(2)(A)(i)(I) of the Act. Moreover, in *Michel,* the BIA referred specifically to the fact that, in certain cases, IIRIRA provides limits to an alien's eligibility to seek a waiver of inadmissibility pursuant to section 212(h) of the Act. *See Michel* at 1103. Indeed, the Act makes it very clear that the section 212(h) waiver applies only to controlled substance cases that involve a single offense of possession of 30 grams or less of marijuana. In this case, the applicant was convicted of criminal possession of more than 8 ounces of marihuana. He is thus statutorily ineligible to be considered for a section 212(h) waiver.

Because the applicant is statutorily ineligible for relief, no purpose would be served in discussing whether the applicant has established extreme hardship to his U.S. citizen wife or whether he merits the waiver as a matter of discretion.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has not met his burden.

ORDER: The appeal is dismissed.